IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———

THE UNITED STATES OF AMERICA *ex rel* JOHN C. McDERMOTT,
Petitioner,

—against—

ARTHUR G. JAEGER, United States Marshal for the Eastern District of New York, and E. E. THOMPSON, Warden of Federal Detention Headquarters, New York City,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

INTRODUCTORY STATEMENT.

1.

REPORT OF OPINIONS BELOW.

The opinion of the Circuit Court of Appeals has not as yet been officially reported. That of the District Court is reported at

2.

JURISDICTION.

The judgment of the Circuit Court of Appeals dismissing the appeal was entered on the 23rd day of March, 1942, (R. 29).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended in the Act of February 13th, 1925, (43 Stat. 938; 28 U. S. C. A., Sec. 347).

3.

SPECIFICATIONS OF ERROR.

The specifications of error are set out in the Petition *supra* (p. 4).

B.

ARGUMENT.

SUMMARY OF ARGUMENT.

Petitioner was deprived of his right of appeal on the theory that such right had been cut off by the Act of June 29, 1938, c. 806, 52 Stat., 1232 (28 U. S. C. A., Sec. 463), which provided, among other things, "That there shall be no right of appeal from" a final order vacating a writ of habeas corpus in any "proceeding to test the validity of a warrant of removal issued *pursuant to the provisions of Section 591 of Title 18* or the detention pending removal proceedings." (Emphasis supplied).

Petitioner contends that the detention of the prisoners for removal must, if they were to be deprived of their right to appeal, as conferred by the same act (28 U. S. C. A., Sec. 463), have been "pursuant to the provisions of Section 591 of Title 18" of the United States Code; that their detention, to have been pursuant to such provisions, must have been

authorized thereby; and that their detention was not authorized by such provisions, since those provisions authorized such detention (1) only when the crime for which the accused were detained was an offense charged to have been committed against the United States, (2) only when the court in which they were to be tried was a court of the United States and (3) only when the crime for which they were held to answer, if an infamous one, was charged on the presentment of a grand jury, and since none of these conditions precedent were here present.

POINT I.

The Statute on Whose Authority the Petitioner's Appeal Was Dismissed by the Circuit Court of Appeals Has No Application to This Case.

A.

This is Not a Case Within the Purview of 18 U. S. C. A., Sec. 591, As to Which Alone the Right of Appeal is Abolished by 28 U. S. C. A., Sec. 463.

The statute in reliance upon which the Circuit Court of Appeals dismissed petitioner's appeal is the Act of June 29, 1938, c. 806, 52 Stat. 1232, (28 U. S. C. A., Sec. 463), amending the Act of February 13, 1925, c. 229, Sec. 6, 43 Stat. 940, which, as amended, reads in its pertinent portion as follows:

> "Review—(a) *By circuit courts of appeals; jurisdiction of circuit judge to issue writ.*—In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however*, That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal

issued *pursuant to the provisions of Section 591 of Title 18* or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had" (Last emphasis supplied).

The express verbiage of this statute shows that it is confined to appeals from orders in habeas corpus proceedings "to test the validity of a warrant of removal issued pursuant to the provisions of Section 591 of Title 18 or the detention pending removal proceedings."

The statute, therefore, leaves untouched and unaffected the right of appeal from any and all orders in any and all other habeas corpus proceedings.

"Pursuant to the provisions," means *authorized* by the provisions (*Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 301 U. S. 379). And the detention of the accused by the respondents was in no sense authorized by 18 U. S. C. A., Sec. 591; not even colorably.

1.

The Crime is Not Charged to Have Been Committed Against the United States.

A glance at the said Section 591 of Title 18, U. S. C. A.,—"pursuant to the provisions" of which, the warrant of removal must have been issued, to cut off the right of appeal,—shows that it applies only to those cases in which the offender is held to answer the charge of having committed a "crime or offense against the United States".

The accused were held, as the record shows, to answer the charge of having committed a *crime or offense against the Government of the Canal Zone.* (R. 12-13.)

The name of the plaintiff, preferring the charge, is "the

Government of the Canal Zone" (id. 12). And the charge is that they, the accused, in doing what they are alleged to have done, "did then and there commit the offense of Violation of Section 502, Title 18, United States Code, contrary to the law in such case made and provided and *against the peace and dignity of the Government of the Canal Zone*" (id. 13). (Emphasis supplied).

2.

The Removal Sought Was Not from One District to Another of the United States.

Counsel for respondents below conceded, that the Canal Zone is, for the purpose of these proceedings, foreign territory, not incorporated into, nor a part of, the United States of America, and therefore, not subject to the guaranties of the United States Constitution.

But, as will also be seen from a consideration of said Section 591 of Title 18 U. S. C. A.,—"pursuant to the provisions of" which the warrant of removal must have been issued, to cut off the right of appeal, under 28 U. S. C. A., Sec. 463,—the removals for trial therein contemplated are only removals as between different districts of the United States.

Thus, the only officials who can hold the offender for trial, under the provisions of the said statute (18 U. S. C. A., Sec. 591), are justices, judges, or commissioners of the United States, or chancellors or judges of supreme or superior courts, chief or first judges of common pleas, mayors of cities, and justices of the peace or other magistrates of one of the *States* of the *United States*. And they may be so held only "agreeably to the usual mode of process against offenders in such *States*."

It is, therefore, quite obvious that an offender could not be removed *from* the Canal Zone *to* the Eastern District of New York "pursuant to the provisions of Section 591 of Title 18." If the District Attorney in the Eastern District of New York wanted such an offender brought up *to* his

district *from* the Canal Zone, he would have to proceed by way of extradition; not 'pursuant to the provisions of Section 591 of Title 18." And, therefore, it appears quite clear that, since it is only in the case of warrants of removal there are "issued pursuant to the provisions of" this last-named section that the right of appeal is cut off, no right of appeal would be cut off in the case of similar proceedings brought in the Canal Zone for the removal of the appellants *from* that country *to* the Eastern District of New York.

But, if no offender can be removed pursuant to the provisions of Section 591 of Title 18 *from* the Canal Zone *to* the Eastern District of New York, logic, to say nothing of a becoming sense of comity, requires us to conclude that it is quite as impossible to conceive that Congress meant the provisions of Section 591 of Title 18 to be applicable to attempts made to remove offenders *from* the Eastern District of New York *to* the Canal Zone. It is inconceivable that Congress should have meant the statute to have a one-sided application as between the Eastern District of New York and the Canal Zone, applicable to offenders going, but not to offenders coming.

Furthermore, the express language of Section 591 of Title 18 shows that the proceedings therein contemplated shall be conducted "at the expense of the United States." Obviously this provision was inserted because of the fact that the proceedings contemplated were proceedings for the benefit of the United States. It could not have been the thought that the proceedings therein contemplated might be conducted for the benefit of some foreign country. Otherwise the provision would have been that the proceedings should be conducted at the expense of such foreign country.

Respondents' counsel below referred to no case in which removal, "pursuant to the provisions of Section 591 of Title 18", was ever utilized, as between the United States and any of its insular or other possessions.

The Courts below have thus, by their rulings, certainly introduced an innovation into our criminal jurisprudence.

That it is too, an unauthorized innovation, seems clear.

The Court of Appeals cited two cases, *Ex Parte Krause*, 228 Fed. 547, (W. D. Wash.), and *United States* v. *Haskins*, Fed. Cas. No. 15,322 (Cal.).

The first refused to hold an accused for removal from the State of Washington to the Territory of Alaska under what is now 18 U. S. C. A., Sec. 591.

And the second permitted removal under the same statute from the State of California to the then Territory of Utah.

Neither would seem to constitute an acceptable authority for the innovation here sanctioned.

3.

The Canal Zone Code Provides for Extradition, Not Removal, To and From That Possession.

The Canal Zone Code (Act of Congress of June 19, 1934, c. 667, 48 Stat. 1122) supports petitioner's view that the provisions of section 591 of Title 18 have never been, or been meant to be, made applicable by Congress to the Canal Zone.

Section I of the preamble of that Act provides that the laws embodied in the Canal Zone Code "shall, for all purposes, establish conclusively, and be deemed to embrace, all the permanent laws relating to or applying in the Canal Zone in force on the date of enactment of this act, except such general laws of the United States as relate to and apply in the Canal Zone."

Section 591 of Title 18, U. S. C. A. is *not* one of the laws *embodied* in the Canal Zone Code, either in name or in substance.

On the other hand, the Canal Zone does prescribe, with great particularity, the method to be employed for the transfer of offenders to and from the Canal Zone. And that method is *extradition*, not removal (Canal Zone Code, Sections 861-871).*

* The more pertinent of these sections follow:

Thus, Section 861 makes applicable, to the Canal Zone,

> "all laws and treaties relating to the *extradition of* persons accused of crime in force in the United States" (Emphasis supplied);

as well as

> "all laws relating to the *rendition* of *fugitives from justice* as between the several States and Territories of the United States" (Emphasis supplied).

Section 864 provides that, when an offender found in the Canal Zone is demanded by a State or Territory, he may be arrested for rendition "as provided in 5278 of the Revised Statutes of the United States (U. S. Code, Title 18, Sec. 662)." The Federal statute, thus referred to, is, the Court will observe, the United States Statute relating to extradition as between the States and Territories of the United States, which imposes the expense of the proceedings upon the State or Territory making the demand.

The said Section 864 of the Canal Zone Code provides, as the only mode for the arrest of the offender, that it be

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"861. Application of Laws and Treaties of United States.—All laws and treaties relating to the extradition of persons accused of crime in force in the United States, to the extent that they are not in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several State and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes the Canal Zone shall be considered and treated as an organized Territory of the United States.

"862. Warrant for arrest of fugitives from State or Territory.—A magistrate may issue a warrant for the apprehension of a person charged in any State or Territory of the United States with having committed treason or felony who flees from justice and is found in the Canal Zone.

"863. Proceedings for arrest and commitment.—The proceedings for the arrest and commitment of a person so charged shall be in all respects similar to those provided in this title for the arrest and commitment of a person charged with a public offense committed in the Canal Zone, except that a certified copy of an instrument found, or other judicial proceeding had against him in the State or Territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

"864. Commitment pending arrest on warrant of Governor.—If, from the examination, it appears that the accused has committed the

"*upon the warrant of the Governor of the Panama Canal,* on the demand of the executive authority of the State or Territory in which the fugitive committed the offense, unless he gives bail as provided in the next section following, or until he is legally discharged" (Emphasis supplied).

This, of course, is the method of extradition by political authorities, not the method of removal by judicial warrant.

And Section 868 of the Canal Zone Code, it will be observed, provides that the offender "must be discharged from custody or bail" unless, within the time limited in his original commitment "he is arrested *under the warrant of the Governor*" (Emphasis supplied).

And Section 870 of the same Canal Zone Code provides that when such an offender is returned from a State or Territory of the United States to the Canal Zone, pursuant to the latter's demand, "the accounts of the person *employed by the Governor* to bring back such fugitive must be audited and paid out of the treasury of the Canal Zone" (Emphasis supplied).

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crime alleged, the magistrate by warrant reciting the accusation must commit the fugitive to the proper custody in that subdivision for such time, to be specified in the warrant, as the magistrate may deem reasonable to permit the arrest of the fugitive, as provided in 5278 of the Revised Statutes of the United States (U. S. Code, title 18, sec. 662), upon the warrant of the Governor of the Panama Canal, on the demand of the executive authority of the State or Territory in which the fugitive committed the offense, unless he gives bail as provided in the next section following, or until he is legally discharged."

"868. Discharge of person unless arrested on warrant of Governor.—The person arrested must be discharged from custody or bail unless, before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the Governor."

"870. Accounts of person employed to bring fugitive back to Canal Zone.—When the Governor of the Panama Canal demands the surrender to the authorities of the Canal Zone of a fugitive from justice who has been found and arrested in any State or Territory of the United States or in any foreign country, the accounts of the person employed by the Governor to bring back such fugitive must be audited and paid out of the treasury of the Canal Zone."

It has been noted *supra* that section 864 of the Canal Zone Code expressly refers to Section 5278 of the Revised Statutes of the United States (U. S. Code, Title 18, Sec. 662)*, which is the United States Extradition Statute. No reference is found in any part of the Canal Zone Code to Section 591 of Title 18, United States Code Annotated.

Thus it appears quite clear that the only method contemplated or provided by Congress for the transfer, as between the Canal Zone and the United States, of persons found in one jurisdiction and wanted for trial on criminal charges in the other, is the method of *extradition, not* that of *removal "pursuant to the provisions of Section 591 of Title 18."*

Therefore, it must follow, that the arrest or imprisonment in the Eastern District of New York of one wanted for trial on criminal charges in the Canal Zone presents a case within the purview of 18 U. S. C. A., 662, not Section 591 of Title 18.

4.

An Indictment is a SINE QUA NON to a Case Within the Removal Statute, Where the Offense Charged is an Infamous Crime.

Below counsel for respondents argued that the Constitutional guaranty of indictment in the case of an infamous

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* This Extradition Statute of the United States reads as follows:

"662. Fugitives from State or Territory. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitives to the State or Territory making such demand, shall be paid by such State or Territory.

crime (Fifth Amendment) has *no* application to the Canal Zone; yet, at the same time, he invoked, for its benefit, a removal statute that can have no application save where that Constitution *does* apply.

We have shown *supra* (3-5) how the wording of the removal statute (18 U. S. C. A., Sec. 591) shows that it was meant to apply only to integral parts of the United States proper, those parts within the pale of the Constitution. Judicial authority confirms that view. The leading case, perhaps, on this particular point, is *Beavers* v. *Henkel*, 194 U. S. 73, where this Court so construed the removal statute, and pointed out the broad distinction between removal thereunder and extradition. It was said (83):

> "Obviously very different considerations are applicable to the two cases. In an extradition the nation surrendering relies for future protection of the alleged offender upon the good faith of the nation to which the surrender is made, *while here*" (removal under 18 U. S. C. A., Sec. 591) "*the full protecting power of the United States is continued after the removal from the place of arrest to the place of trial*" (Emphasis supplied).

When the alleged offender is removed under section 591 of Title 18, "the full protecting power of the United States" goes with him. And that full protecting power must include the great charter that regulates its exercise, the Federal Constitution.

If, therefore, the Canal Zone, for all present purposes, is, as respondent's counsel argued below, foreign territory, not subject to Constitutional limitations, it must follow that the case here presented cannot be one within the provisions of 18 U. S. C. A., Sec. 591.

This Court in *Beavers* v. *Henkel, supra*, further pointed out that all removal proceedings under Sec. 1014 of the Revised Statutes (18 U. S. C. A., Sec. 591) are subject to the requirement of an indictment under the Fifth Amend-

ment of the Constitution (83-85). It was there said, after the quoting of that amendment, (84),

> "While many States in the exercise of their undoubted sovereignty, *Hurtado* v. *California*, 110 U. S. 516, have provided for trials of criminal offenses upon information filed by the prosecuting officer and without any previous inquiry or action by a grand jury, the national Constitution, in its solicitude for the protection of the individual, *requires an indictment as a prerequisite to a trial.* The grand jury is a body known to the common law, to *which* is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged" (Emphasis supplied).

Then, after quoting from Blackstone's discussion of the grand jury system, the opinion in *Beavers* v. *Henkel, supra,* discussed the meaning of the requirement of the Fifth Amendment, as applied to proceedings for removal under Sec. 1014 U. S. Rev. Stat. (18 U. S. C. A., Sec. 591). It stated (84-85):

> "The thought is that *no one* shall be subjected to the burden and expense of a trial until there has been a *prior inquiry and adjudication by a responsible tribunal* that there is probable cause to believe him guilty. But the Constitution does *not* require *two* such inquiries and adjudications. The government, having once satisfied the *provision"* (the Fifth Amendment) "for an *inquiry* and obtained an *adjudication by the proper tribunal"* (the grand jury) "of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. * * * And the place where such *inquiry must be had and the decision of a grand jury obtained* is the locality in which *by the Constitution* and laws the final trial must be had (Emphasis supplied).

And that exposition of the Fifth Amendment of the

Constitution, as applying to removal proceedings under 18 U. S. C. A., Sec. 591, has recently been reaffirmed by this Court in *United States* v. *Mulligan*, 295 U. S. 396, 400, where it was said (400):

> "It may not with perfect accuracy be said, as in some removal decisions it has been said or implied, that the indictment is evidence of the facts that it alleges. But it fulfills the *Constitutional requirement* (Amendment V), establishes probable cause (Amendment IV) and is itself authority to bring the accused to trial" (Emphasis supplied).

To present a case for the application *in limine* of 18 U. S. C. A., Sec. 591, it thus seems clear, there must under the Constitution be, in the case of an infamous crime, an indictment found in the demanding jurisdiction. This was wanting here.

Accordingly, to recapitulate, 28 U. S. C. A., Sec. 463, as amended, cannot, in any respect, be effective here to cut off or impair the petitioner's right of appeal, since the conditions, upon which the applicability of that statute is predicated, are entirely wanting. No offense is charged against the United States; the removal is not sought from one District of the United States to another; the remedy is foreign to anything permissible under the Canal Zone Code; and the Constitutional basis, upon which alone the applicability of the removal statute can be predicated, is wanting.

POINT II.

The Writ of Certiorari prayed for should be granted to the end that this Court may review and reverse the judgments entered below.

Respectfully submitted,

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Counsel for Petitioner.